

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILD FISH CONSERVANCY,

Plaintiff,

v.

COOKE AQUACULTURE PACIFIC, LLC,

Defendant.

CASE NO. C17-1708-JCC

ORDER

This matter comes before the Court on Plaintiff's motion to compel, for sanctions, and to modify case schedule (Dkt. No. 46). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS in part and DENIES in part the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff filed this citizen suit pursuant to the Clean Water Act ("CWA"), 33 U.S.C. § 1365, alleging, among other things, that Defendant failed to adequately inspect and maintain eight Atlantic salmon farms it operated across the Puget Sound, in violation of its National Pollutant Discharge Elimination System permits. (Dkt. No. 1 at 6–7.) On December 13, 2018, Plaintiff served Defendant with a deposition notice pursuant to Federal Rule of Civil Procedure 30(b)(6). (Dkt. No. 46-1 at 5.) Plaintiff identified 33 topics for which it sought testimony from Defendant. (*Id.* at 8–16.) As relevant to the present motion, topic 8 sought information regarding

1 inspections Defendant conducted on the anchoring components at each of its facilities.¹ (*Id.* at
2 11.) Topic 10 sought information regarding any maintenance Defendant had undertaken at its
3 facilities since 2012. (*Id.* at 12.) As part of its notice, Plaintiff also instructed Defendant to
4 produce any documents related to inspections conducted during the relevant period. (*Id.* at 16–
5 17) (citing Fed. R. Civ. P. 34).

6 After conferring, the parties agreed that Defendant would be deposed for two days on
7 February 28 and March 1, 2019. (*Id.* at 186.) Defendant designated its General Manager, Jim
8 Parsons, to testify on its behalf. (*Id.* at 25.) In the days leading up to the deposition, Defendant
9 produced more than 30,000 pages of documents, which were purportedly responsive to
10 Plaintiff’s Rule 34 request as well as to topics 8 and 10.² (*Id.* at 209–13.) These documents
11 included, for example, dive logs that appear to show the removal of dead fish from Defendant’s
12 facilities. (*Id.* at 289–313.)

13 Plaintiff asserts that Parsons was “unable and/or unwilling to testify on issues 8 and 10
14 identified in the deposition notice.” (Dkt. No. 46 at 8.) Plaintiff states that Parsons was unable to
15 identify, with any specificity, who conducted the anchor inspections at Defendant’s facilities or
16 when the inspections occurred. (*Id.* at 9.) Plaintiff further asserts that Parsons was unable to
17 testify about whether Defendant’s anchor inspections revealed a need for maintenance or repair.
18 (*Id.*) Instead, Parsons repeatedly stated that the relevant information could be found in the
19 records Defendant produced to Plaintiff prior to the deposition. (*Id.*; *see, e.g.*, Dkt. No. 46-1 at
20 126–27.)

21 Plaintiff asks the Court to re-open Defendant’s deposition so that it can fully respond to
22 questions regarding topics 8 and 10. (Dkt. No. 46 at 2.) In addition, Plaintiff asks for an award of

24 ¹ Topic 8 included over a dozen specific inquiries, such as “how and where the
25 inspections were conducted, what dates the inspections were conducted, [and] who conducted the
26 inspections” (Dkt. No. 46-1 at 11.)

² Defendant refused to bring physical copies of the documents to the deposition because
they were too voluminous. (Dkt. No. 46-1 at 209–10.)

1 fees for bringing this motion and for its expenses incurred in having to conduct an additional
2 deposition. (*Id.* at 11–12.) Plaintiff also asks for a 45-day trial continuance based on Defendant’s
3 delay in providing timely discovery responses. (*Id.* at 12–13.) Defendant argues that Parsons was
4 adequately prepared for his deposition, that an award of fees is not warranted, and that the Court
5 should keep the current trial schedule. (*See* Dkt. No. 49.)

6 **II. DISCUSSION**

7 **A. Motion to Compel Additional Rule 30(b)(6) Deposition**

8 Pursuant to Federal Rule of Civil Procedure 30(b)(6):

9 [A] party may name as the deponent a public or private corporation, a partnership,
10 an association, a governmental agency, or other entity and must describe with
11 reasonable particularity the matters for examination. The named organization must
12 then designate one or more officers, directors, or managing agents, or designate
13 other persons who consent to testify on its behalf; and it may set out the matters on
14 which each person designated will testify . . . The persons so designated shall
15 testify as to the matters known or reasonably available to the organization.

16 Fed. R. Civ. P. 30(b)(6). As one court has noted, a corporation has “a duty to make a
17 conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6)
18 depositions and to prepare them to fully and unevasively answer questions about the designated
19 subject matter.” *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *see also*
20 *Flowers v. Fred Hutchinson Cancer Research Ctr.*, Case No. C17-0989-JCC, Dkt. No. 75 at 7
21 (W.D. Wash. 2018) (holding that defendant failed to prepare a corporate designee who could not
22 answer questions regarding one out of thirty topics). A party may move for an order compelling
23 discovery where a Rule 30 deponent fails to answer questions. Fed. R. Civ. P. 37(a)(3)(B)(i).
24 Rule 37 instructs courts to treat a deponent’s “evasive or incomplete” answer as a failure to
25 answer. Fed. R. Civ. P. 37(a)(4).

26 The Court has read the relevant deposition transcript and concludes that Parsons was not
adequately prepared to testify about the matters included in topics 8 and 10 of Plaintiff’s
deposition notice. (*See* Dkt. No. 46-1 at 64–150.) The following excerpt is characteristic of
Parsons’ answers to Plaintiff’s questions concerning the inspection of anchoring components as

1 described in topic 8:

2 **Counsel:** In 2018, did Cooke inspect all of the anchoring components at
3 Hope Island?

4 **Parsons:** Yes.

5 **Counsel:** Did Cooke visually inspect those anchoring components in 2018
6 all the way down to the anchors?

7 **Parsons:** Yes.

8 **Counsel:** Are you able to identify who conducted those inspections?

9 **Parsons:** Again, they would be members of the dive crew at Hope Island.
10 Those names would be reflected in the dive logs.

11 **Counsel:** Can you provide those names today?

12 **Parsons:** Those names are on company personnel lists and in the dive
13 records.

14 **Counsel:** Can you provide the dates that those inspections occurred?

15 **Parsons:** Again, the same answer, those are on daily logs and dive records
16 and part of Cooke's knowledge.

17 **Counsel:** You're unable to provide the days when those inspections
18 occurred today?

19 **Parsons:** I believe that I have. They are part of the record.

20 **Counsel:** Your answer is that they are part of the record?

21 **Parsons:** Yes.

22 (*Id.* at 126–27.)³ The following excerpt is characteristic of Parsons' answers to Plaintiff's
23 questions concerning the need for repair of anchoring components as described in topic 10:

24 **Counsel:** Do you know whether the underwater inspections of underwater
25 anchoring components at Hope Island in 2015 indicated a need to replace or repair
26 anchoring components?

Parsons: Again, that company knowledge would be reflected in the vessel
repair logs. If indeed a problem was found, those anchors are then brought to the
surface and repaired. If a problem isn't noted, the inspection is simply noted on the
dive logs.

Counsel: So you are not able to answer whether or not any notes indicated
a need for repairs or replacements in 2015 of the anchoring components?

³ The Court omitted two form-of-the-question objections interposed by defense counsel during this exchange. (*See* Dkt. No. 46-1 at 126–27.)

1 **Parsons:** The company knowledge would reflect that and would have been
provided to you.

2 **Counsel:** You're not able to testify as to that today?

3 **Parsons:** I'm not testifying personally. I'm testifying on behalf of Cooke
4 Aquaculture Pacific. And the full company knowledge is reflected in the record.

5 (*Id.* at 133) (*see also id.* at 144).

6 Parsons' answers to the above questions were evasive because they failed to provide a
7 responsive answer and instead vaguely referred Plaintiff to various documents "in the record."
8 (*See id.* at 60–148.) As an initial matter, a Rule 30(b)(6) deponent does not meet his or her duty
9 to testify to a corporation's knowledge simply by pointing opposing counsel to other discovery
10 documents that have been produced. *Great Am. Ins. Co. of N.Y. v. Vegas Const. Co.*, 251 F.R.D.
11 534, 539 (D. Nev. 2008) ("[A] corporation may not take the position that its documents state the
12 company's position.").

13 Parsons' repeated references to documents in the record were particularly evasive in light
14 of the way in which Defendant produced those documents to Plaintiff. Just days before the
15 deposition, Defendant inundated Plaintiff with over 30,000 documents that it suggested were
16 relevant to topics 8 and 10. (Dkt. Nos. 46 at 6, 46-1 at 209–13.)⁴ Having reviewed dozens of the
17 documents that Defendant and Parsons suggested were responsive to the topics of anchor
18 inspections and maintenance, the Court finds that it is not facially clear how the documents
19 address those topics. (*See, e.g.*, Dkt. No. 46-1 at 290–313, 315–27.) The Court would be more
20 understanding of Defendant's position that Plaintiff's counsel should have presented Parsons
21 with the responsive documents during the deposition had Defendant not engaged in eleventh
22 hour disclosure and been clearer about how the documents related to Plaintiff's deposition topics.

23 The combination of Defendant's last-minute disclosure of documents and Parsons'
24 references to documents in "the record" frustrated Plaintiff's ability to develop testimony

25 ⁴ It also appears from the record that Plaintiff sought much of this information for
26 approximately a year through the use of interrogatories, requests for production, and requests for
admission. (*See* Dkt. No. 25-1 at 33–35.)

1 regarding topics 8 and 10. With regard to those topics, Defendant did not meet its duty under
2 Rule 30(b)(6) to prepare Parsons to fully and unequivocally answer questions. Pursuant to Rule 37,
3 Plaintiff shall be allowed to depose Defendant for one additional day not to exceed seven hours.

4 **B. Motion for Fees**

5 When a court grants a Rule 37 motion to compel it must “require the party or deponent
6 whose conduct necessitated the motion, the party or attorney advising that conduct, or both to
7 pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.”
8 Fed. R. Civ. P. 37(a)(5)(A). However, such sanctions are not warranted if:

9 (i) the movant filed the motion before attempting in good faith to obtain the
10 disclosure or discovery without court action;

11 (ii) the opposing party’s nondisclosure, response, or objection was substantially
12 justified; or

13 (iii) other circumstances make an award of expenses unjust.

14 Fed. R. Civ. P. 37(a)(5)(A)(i)–(iii). The Court may also require a corporate defendant to pay for
15 the costs of reconvening a Rule 30(b)(6) deposition. *See Lains v. Am. Family Mut. Ins. Co.*, Case
16 No. C14-1982-JCC, Dkt. No. 172 at 3 (W.D. Wash. 2016).

17 While the Court has found that Defendant failed to adequately prepare Parsons to answer
18 questions regarding topics 8 and 10, the Court does not believe that Parsons was so ill-prepared
19 that an award of expenses or other monetary sanctions is appropriate. Plaintiff provided
20 Defendant with 33 deposition topics, most of which had numerous subtopics. (*See* Dkt. No. 46-1
21 at 8–16.) Plaintiff has only demonstrated that over the course of two days, Parsons provided
22 evasive answers regarding 2 out of 33 topics. Additionally, Defendant states that Parsons spent
23 approximately 100 hours preparing for the deposition. (Dkt. No. 50 at 2.) Under the
24 circumstances, the Court finds that an award of expenses or other monetary sanctions would be
25 unjust. *See* Fed. R. Civ. P. 37(a)(5)(A)(iii). Therefore, Plaintiff’s motion for attorney fees and
26 expenses is DENIED.

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1 **C. Motion to Continue Trial**

2 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a court’s scheduling order can be
3 modified “only for good cause and with the judge’s consent.” The good cause standard
4 “primarily considers the diligence of the party seeking amendment. The district court may
5 modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party
6 seeking the extension.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.
7 1992) (citation and internal quotation marks omitted).

8 Here, Plaintiff has demonstrated good cause to continue the current case schedule. All
9 expert disclosures are currently due by April 26, 2019, discovery closes on May 24, 2019, and
10 trial is scheduled for September 23, 2019. (*See* Dkt. No. 20.) Defendant’s delay in producing
11 discovery has prevented Plaintiff from adequately preparing its expert witness within the current
12 case deadlines. (*See* Dkt. No. 46 at 12–13.) The need for an additional Rule 30(b)(6) deposition
13 provides another justification for a continuance. The Court finds that Plaintiff cannot meet the
14 current case deadlines notwithstanding its diligence. Therefore, Plaintiff’s motion to modify case
15 schedule is GRANTED.

16 **III. CONCLUSION**

17 For the foregoing reasons, Plaintiff’s motion to compel, for sanctions, and to modify case
18 schedule (Dkt. No. 46) is GRANTED in part and DENIED in part. In accordance with the
19 Court’s order:

- 20 1. Plaintiff may depose Defendant for one additional day not to exceed seven hours.
21 Plaintiff shall be limited to asking questions regarding topics 8 and 10 as listed in its
22 notice of deposition (Dkt. No. 46-1 at 11–12.) The deposition shall be noted for no
23 later than June 30, 2019.
- 24 2. Plaintiff’s request for fees and expenses is DENIED.
- 25 3. The bench trial currently scheduled for September 23, 2019, is hereby CONTINUED
26 to December 2, 2019. No later than April 26, 2019, the parties shall file a joint motion

proposing an amended pretrial schedule.

DATED this 19th day of April 2019.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE